UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WINSTON KIM, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. ADEPTUS HEALTH INC., GREGORY W. SCOTT, THOMAS S. HALL, FRANK R. WILLIAMS JR., and TIMOTHY L. FIELDING, Defendants.	Case No.: 6:17-cv-00150-RWS

BENJAMIN BOWMAN'S MOTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF FOR CONSOLIDATION OF RELATED CASES, APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF COUNSEL

Benjamin Bowman ("Movant") respectfully moves this Court, under Section 21D of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), for an order (1) appointing Movant as lead plaintiff on behalf of a putative Class of investors that purchased and/or otherwise acquired Adeptus Health, Inc. securities between April 29, 2016 and March 1, 2017, inclusive, and (2) approving Movant' selection of Bragar Eagel & Squire, P.C. and Glancy Prongay & Murray LLP as Co-Lead Counsel for the class and Kendall Law Group, PLLC as Liaison Counsel.

Movant seeks appointment as lead plaintiff and approval of his choice of counsel pursuant to the Securities Exchange Act of 1934, the Federal Rules of Civil Procedure and the PSLRA. In support of this motion, Movant submits this Motion and Memorandum of Law, the Declaration of Joe Kendall and exhibits thereto, a Proposed Order, and the Court's complete files and records in this action, as well as such further argument as the Court may allow at a hearing on this motion.

SUMMARY

Pursuant to the PSLRA, the Federal Rules of Civil Procedure Movant seeks appointment as lead plaintiff and approval of his choice of counsel. Pursuant to the PSLRA, the Class member or members that possess the largest financial interest in the relief sought by the Class and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure is presumed to be the "most adequate plaintiff" – the plaintiff most capable of adequately representing the interests of Class members. The PSLRA provides that the Court shall appoint the most adequate plaintiff as lead plaintiff. Movant believes that he is the "most adequate plaintiff" as defined by the PSLRA and should be appointed lead plaintiff based on his financial losses suffered as a result of defendants' wrongful conduct as alleged in the above-referenced actions. Moreover, Movant satisfies the typicality and adequacy requirements of Fed. R. Civ. P. 23(a), as his claims are typical of other Class members' claims, and he will fairly and adequately represent the interests of the Class. In addition, Movant's selection of Bragar Eagel & Squire, P.C. and Glancy Prongay & Murray LLP as Co-Lead Counsel for the class and Kendall Law Group, PLLC as Liaison Counsel should be approved, as these firms have substantial expertise and experience in securities and class action litigation.

FACTUAL BACKGROUND[1]

This is a class action on behalf of a putative Class of investors that purchased and/or otherwise acquired the securities of Adeptus during the Class Period, seeking to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5), against the Company and certain of its executive officers.

1 Factual background section adapted from the complaint filed in the above captioned class action.

Adeptus purportedly operates a "patient-centered healthcare organization providing emergency medical care through the largest network of independent freestanding emergency rooms ("FSER") in the United States." On March 2, 2017, the Company filed a Form 12b-25 announcing the delay in the filing of its Form 10-K for the fiscal year ended December 31, 2016 and revealing additional material weaknesses in its internal control over financial reporting.

On this news, Adeptus' share price fell $3.76 or 57.4%, to close at $2.79 per share on March 2, 2017.

The complaint filed in the above captioned lawsuits allege that, as a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

The Complaint filed in this lawsuit alleges that throughout the Class Period, Defendants made materially false and/or misleading statements, as well as failed to disclose: (i) the Company had material weaknesses in its internal control over financial reporting in the areas of revenue recognition, accounts receivable, accounting for a contribution to an unconsolidated joint venture, and accounting for equity in (loss) earnings of unconsolidated joint ventures; (ii) accordingly, the Company lacked effective internal controls over financial reporting; and (iii) as a result of the foregoing, Adeptus' public statements were materially false and misleading at all relevant times.

PROCEDURAL BACKGROUND

Plaintiff Winston Kim ("Kim") commenced the first above-captioned class action against Adeptus on March 10, 2017. That same day, counsel for Kim published a press release announcing the filing of the lawsuit and the 60 day deadline to file a motion to be appointed as lead plaintiff. *See* Declaration of Joe Kendall in Support of Benjamin Bowman's Motion for

Appointment as Lead Plaintiff and Approval of Lead Counsel (the “Kendall Decl.”) at Exhibit (“Exh.”) A.

I. ARGUMENT

A. Movant Should Be Appointed Lead Plaintiff

The PSLRA provides the procedure for selecting a lead plaintiff in class actions brought under the Exchange Act. The PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to a published notice of class action by the later of (i) 90 days after the date of publication of the notice; or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. §78u-4(a)(3)(B). The PSLRA provides a “rebuttable presumption” that the “most adequate plaintiff” – *i.e.*, the plaintiff most capable of adequately representing the interests of the Class – is the person or group that:

> (aa) has either filed the complaint or made a motion in response to a notice...;
>
> (bb) in the determination of the Court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.
>
> 15 U.S.C. §78u-4(a)(3)(B)(iii).
>
> The presumption in favor of appointing Movant as lead plaintiff may be rebutted only upon proof “by a purported member of the plaintiff class” that the presumptively most adequate plaintiff:
>
> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. §78u-4(a)(3)(b)(iii)(II).

As set forth below, Movant satisfies all of these criteria. Movant has complied with all of the PSLRA’s requirements to be appointed lead plaintiff and has, to the best of his knowledge, the largest financial interest in this litigation. In addition, Movant meets the relevant requirements of Federal Rule of Civil Procedure 23(a) and is not aware of any unique defenses defendants could raise against him that would render him inadequate to represent the Class. Accordingly, Movant respectfully submits that he should be appointed lead plaintiff. *See Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 397 (S.D.N.Y. 2008).

1. Movant Filed a Timely Motion in Response to a PSLRA Notice

On March 10, 2017, pursuant to 15 U.S.C. §78u-4(a)(3)(A), counsel for Kim published a notice of the pendency of plaintiff's case on *Business Wire* – a widely circulated national business-oriented wire service – announcing that a securities class action had been filed against defendants, herein, and advising purchasers of Adeptus securities that they had 60 days to file a motion to be appointed as lead plaintiff.

Movant files this motion pursuant to Kim's March 10, 2017 notice, within the 60-day period following publication of the notice, submits herewith his sworn certification and attests his willingness to serve as representative of the Class and willingness to provide testimony at deposition and trial, if necessary. *See* Kendall Decl., Exh. B.

By filing a complaint and making a timely motion in response to a published PSLRA notice, Movant satisfies the first PSLRA requirement to be lead plaintiff.

2. Movant Has the Largest Financial Interest

The PSLRA requires a court to adopt the rebuttable presumption that "the most adequate plaintiff…is the person or group of persons that…has the largest financial interest in the relief sought by the class." 15 U.S.C. §78u-4(a)(3)(B)(iii). Movant believes that he has the largest financial interest among Class members who filed timely applications for appointment as lead plaintiff and are presumed to be the "most adequate plaintiff."

During the Class Period, Movant purchased Adeptus shares at prices artificially inflated by defendants' allegedly misleading statements and omissions and, as a result of his transactions, suffered financial losses of over $84,000 on his claims. *See* Kendall Decl., Exh. C. At the time of filing this motion, Movant believes he has the largest financial interest of any plaintiff or lead plaintiff Movant. Movant, thus, satisfies the second PSLRA requirement – the largest financial interest in the relief sought by the Class. *See Varghese,* 589 F. Supp. 2d at 396.

3. Movant Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must "otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure." *See In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001), cert. denied, 535 U.S. 929 (2002). Rule 23(a) generally provides that a class action may proceed if the following four requirements are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class. Fed. R. Civ. P. 23(a).

In making its determination that a lead plaintiff candidate otherwise satisfy the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification. At the lead plaintiff stage of the litigation, Movant need only make a preliminary showing that he satisfies Rule 23's typicality and adequacy requirements. *See Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997).

a. Movant's Claims Are Typical

The Rule 23(a) typicality requirement is satisfied when a plaintiff's claims arise from the same events or course of conduct that give rise to other class members' claims, and plaintiff's claims are based on the same legal theory. *See In re Waste Mgmt. Sec. Litig.*, 128 F. Supp. 2d 401, 411 (S.D. Tex. 2000). Rule 23 does not require the lead plaintiff to be identically situated with all class members. *See Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

Movant's claims are typical of the claims asserted by the proposed Class. Like all members of the Class, Movant allege that defendants violated the federal securities laws by disseminating materially misleading statements concerning the operations and financial performance of Adeptus. Movant, like all of the members of the Class, purchased Adeptus shares at prices artificially inflated by defendants' alleged misstatements and omissions and were damaged thereby. These shared claims, which are based on the same legal theory and arise from the same events and course of conduct as the Class's claims, satisfy the typicality requirement of Rule 23(a)(3).

b. Movant Is an Adequate Representative

The adequacy requirement of Rule 23(a)(4) is satisfied where it is established that a representative party has the ability to represent the claims of the class vigorously and has obtained adequate counsel, and the Movant's claims are not antagonistic to other class members' claims. *Id.* Here, Movant has retained counsel highly experienced in vigorously and efficiently prosecuting securities class actions, such as this action, and his significant financial losses demonstrate that he has a sufficient interest in the outcome of this litigation to ensure vigorous advocacy. In addition, Movant is not aware that any conflict exists between his claims and those asserted on behalf of the Class.

B. The Court Should Approve Movant's Choice of Counsel

The PSLRA vests authority in the lead plaintiff to select and retain counsel, subject only to approval of the Court. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). Thus, a court should interfere with the lead plaintiff's selection "only when necessary 'to protect the interests of the class.'" *Hohenstein v. Behringer Harvard Reit I, Inc.*, 2012 WL 6625382, at *3 (N.D. Tex. Dec. 20 2012). Movant has retained Bragar Eagel & Squire, P.C. and Glancy Prongay & Murray LLP to pursue this litigation on his behalf and will retain these firms as plaintiffs' co-lead counsel, with Kendall Law Group, PLLC as liaison counsel, in the event Movant are appointed lead plaintiff. As reflected by the firms' résumés, Bragar Eagel & Squire, P.C., Glancy Prongay & Murray LLP, and Kendall Law Group, PLLC possess extensive experience and expertise in securities litigation, and the firms have the necessary skills and resources to efficiently and effectively prosecute this action. *See* Kendall Decl., Exhs. D, E, and F. Thus, the Court may be assured that by granting Movant's motion, the Class will receive the highest caliber of legal representation.

II. CONCLUSION

For the foregoing reasons, Movant respectfully ask the Court to grant their motion and enter an Order (1) appointing Movant as lead plaintiff, (2) approving Movant's selection of Bragar Eagel & Squire, P.C. and Glancy Prongay & Murray LLP as Co-Lead Counsel for the class and Kendall Law Group, PLLC as Liaison Counsel, and (3) granting such other relief as the Court may deem just and proper.

DATED: May 9, 2017

Respectfully submitted,

/s/Joe Kendall
KENDALL LAW GROUP, PLLC
Joe Kendall
Texas Bar No. 11260700
jkendall@kendalllawgroup.com
Jamie J. McKey
Texas Bar No. 24025262
jmckey@kendalllawgroup.com
3232 McKinney, Suite 700
Dallas, Texas 75204
Tel: (214) 744-3000
Fax: (214) 744-3015

Proposed Liaison Counsel for Lead Plaintiff and the Class

BRAGAR EAGEL & SQUIRE, P.C.
Todd H. Henderson
Melissa A. Fortunato
885 Third Avenue, Suite 3040
New York, NY 10022
Telephone: (212) 355-4648
Facsimile: (212) 214-0506

GLANCY PRONGAY & MURRAY LLP
Lionel Z. Glancy
Lesley F. Portnoy
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Tel: (310) 201-9150
Fax: (310) 201-9160

Proposed Co-Lead Counsel for Lead Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to all counsel of record who have consented to electronic notification. I further certify that I mailed or e-mailed the foregoing document and the notice of electronic filing to all non-CM/ECF participants.

/s/Joe Kendall
Joe Kendall

CERTIFICATE OF CONFERENCE

This motion is filed pursuant to the PSLRA, which provides that within 60 days after publication of the required notice, any member of the proposed Class may apply to the Court to be appointed as lead plaintiff; consequently, at this time Movant' counsel has no way of knowing which Class members, if any, are filing competing lead plaintiff motions. As a result, Movant's counsel has been unable to conference with opposing counsel as prescribed in Local Rule 7.1a, and respectfully requests that the conference requirement of Local Rule 7.1a be waived for this motion.

/s/Joe Kendall
Joe Kendall